MOTION FILED
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No. 95-586

In The

Supreme Court of the United States

October Term, 1995

STATE OF WISCONSIN,
et al.
Petitioners,

v.

GERALD R. MUELLER,
UNITED STATES DEPARTMENT OF LABOR,
et al.
Respondents.

On Petition for Writ of Certiorari
to the Seventh Circuit Court of Appeals

MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

RELIEF REQUESTED 1

REASONS RELIEF SHOULD BE GRANTED 2

TABLE OF AUTHORITIES

CASES CITED

Barrentine v. Arkansas-Best Freight System, 750 F.2d 47 (8th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) 3

Bd. of License Comm'rs of Town of Tiverton v. Pastore, 469 U.S. 238 (1985) 2

Donovan v. Richland County Ass'n, 454 U.S. 389 (1982) (*per curiam*) 4

Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health and Welfare, 411 U.S. 279 (1973) 4

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 3

Granados v. Reivitz, 776 F.2d 180 (7th Cir. 1985) . . . 4

Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993) (*en banc*) 2

In re Smith, 964 F.2d 636 (7th Cir. 1992) 4

Lorillard v. Pons, 434 U.S. 575 (1978) 3

Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995), *petition for cert. pending*, Wisconsin v. Mueller, No. 95-586 (App. 1-8) 2, 3

Page

National League of Cities v. Usery,
426 U.S. 833 (1976) 3

Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982) . 4

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) . . . 2

Port Authority Trans-Hudson v. Feeney,
495 U.S. 299 (1990) 4

Seminole Tribe of Florida v. Florida,
116 S.Ct. 1114 (1996) 1, 2, 3, 4

Stoner v. Dep't of Agriculture, Trade & Consumer
Protection, 50 F.3d 481 (7th Cir. 1995) 4

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 4

Weinberger v. State of Wisconsin,
906 F.Supp. 485 (W.D.Wis. 1995) 4

STATUTE CITED

29 U.S.C. §§ 207 *et seq.* 2

CONSTITUTIONAL PROVISIONS

U.S.Const., Art. I, § 8 . . . . . 2, 3

U.S.Const., Amend XI 2, 3, 4

Wis. Const., Art. IV, § 27 4

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RELIEF REQUESTED

The State defendants move to grant a writ of certiorari and to vacate the appellate opinion and decision because, under Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996), the federal courts never obtained subject matter jurisdiction over this action. This outcome-determinative development should be

brought to the Court's attention. Bd. of License Comm'rs of Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985).

REASONS RELIEF SHOULD BE GRANTED

Wisconsin employes, the only plaintiffs, seek monetary relief from the State defendants under the Fair Labor Standards Act, 29 U.S.C. §§ 207 *et seq.* (the FLSA). Mueller v. Reich, 54 F.3d 438, 440, 442-43 (7th Cir. 1995), *petition for cert. pending*, Wisconsin v. Mueller, No. 95-586 (App. 1, 5-8). Congress had no authority to allow them to do so. Seminole Tribe, 116 S.Ct. at 1124-28, 1131-32.

The Eleventh Amendment to the United States Constitution (U.S.Const., Amend XI) bars individuals from suing States in federal court unless either (a) Congress, through constitutionally authorized abrogation of Eleventh Amendment immunity, allows the suits or (b) the State consents to the suits. Seminole Tribe, 116 S.Ct. at 1122-23. Since neither exception applies here, Eleventh Amendment immunity barred federal courts from obtaining jurisdiction over plaintiffs' FLSA claims. *Id.*, 116 S.Ct. at 1124-28, 1131-32.

Until March 27, 1996, it appeared Congress could abrogate, and had abrogated, Eleventh Amendment immunity so that States were subject to private causes of action by their own employes under the FLSA. *E.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Hale v. State of Arizona, 993 F.2d 1387, 1391 (9th Cir. 1993) (*en banc*). Seminole Tribe, on March 27, 1996, expressly overruled Union Gas and held Congress was never constitutionally authorized to create private causes of action in federal court against States under statutes grounded solely on the authority of the Commerce Clause (U.S.Const., Art. I, § 8). 116 S.Ct. at 1124-28, 1131-32.

This is as true for interstate commerce as Indian Commerce which, by contrast, is exclusively within

Congressional control. 116 S.Ct. at 1126-27. "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause" and there is "no principled distinction to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." 116 S.Ct. at 1126-27. Crystal clear Congressional intent to abrogate Eleventh Amendment immunity by creating private causes of action under statutes grounded in the Commerce Clause has no effect because Congress entirely lacks any constitutional authority to abrogate Eleventh Amendment immunity in that fashion. 116 S.Ct. at 1124-28, 1131-32.

The jurisdictional holdings announced in Seminole Tribe bar this action. The plaintiffs are private individuals. Mueller, 54 F.3d at 440-41 (USDOL and Secretary chose not to become plaintiffs). The Commerce Clause is the sole constitutional authority for the FLSA. *E.g.*, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530 (1985); National League of Cities v. Usery, 426 U.S. 833, 840 (1976). Since the FLSA is not grounded on the Fourteenth Amendment to the United States Constitution (U.S.Const., Amend. XIV), its broader intrusion on State authority (Seminole Tribe, 116 S.Ct. at 1125) is inapplicable. The issue of prospective injunctive relief (*id.*, 116 S.Ct. at 1132-33) is also inapplicable since private individuals are limited to only monetary relief under the FLSA. *E.g.*, Barrentine v. Arkansas-Best Freight System, 750 F.2d 47, 51 (8th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); Lorillard v. Pons, 434 U.S. 575, 581 (1978). Congress never had authority to subject States and their officers to private causes of action for monetary relief under the FLSA or under other statutes grounded on the Commerce Clause. Seminole Tribe, 116 S.Ct. at 1124-28, 1131-32.

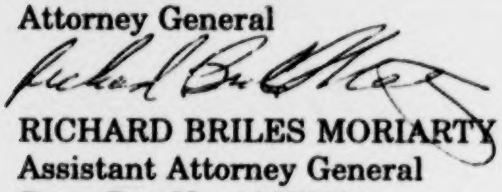
Wisconsin has not consented to any FLSA suit. A State litigant does not surrender Eleventh Amendment

immunity even if it expressly refuses to take advantage of that immunity. Patsy v. Florida Bd. of Regents, 457 U.S. 496, 515, n. 19 (1982) (though defendant did not raise Eleventh Amendment until appeal, never argued it and declined Court's suggestion of resolution on those grounds, "[n]othing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. . . . "). A State consents to suit in federal court only where its Constitution or statutes, by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable implication, declare intent to surrender immunity against suit in federal court. *E.g.*, Port Authority Trans-Hudson v. Feeney, 495 U.S. 299, 305-07 (1990). Wisconsin's Constitution or statutes never consented to the State defendants being sued in federal court under the FLSA. *Cf.* Wis. Const., Art. IV, § 27; Weinberger v. State of Wisconsin, 906 F.Supp. 485, 491 (W.D.Wis. 1995); Stoner v. Dep't of Agriculture, Trade & Consumer Protection, 50 F.3d 481, 482-83 (7th Cir. 1995); Granados v. Reivitz, 776 F.2d 180, 183 (7th Cir. 1985). *See also* Employees of the Dep't of Public Health & Welfare v. Dep't of Public Health and Welfare, 411 U.S. 279, 284-85 (1973) (absent proper abrogation, FLSA suits against unconsenting States barred).

Vacating the appellate decision is not sufficient. The opinion should be vacated because the appellate court lacked jurisdiction. *E.g.*, Donovan v. Richland County Ass'n, 454 U.S. 389, 390 (1982) (*per curiam*). Just vacating the decision allows the opinion to stand as precedent. *E.g.*, In re Smith, 964 F.2d 636, 638 (7th Cir. 1992). A court without jurisdiction to act is powerless to create binding precedent. *E.g.*, Donovan, 454 U.S. at 390. This Court, similarly lacking jurisdiction under Seminole Tribe, should exercise its broad supervisory authority to preclude the appellate decision and opinion from "spawning legal consequences." *E.g.*, United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950).

Respectfully submitted,

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